No. 82-1461

In the

Supreme Court of the United States

OCTOBER TERM, 1982

LARRY D. JONES,
Petitioner,
v.
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE PETITIONER IN REPLY

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May 25, 1983

Central Publishing Company, Inc., Indianapolis, IN 46206

QUESTIONS PRESENTED FOR REVIEW

1. Whether an Illinois arrest warrant has any extra-territorial effect so that federal law enforcement officers may rely upon it and enter a motel room in Indiana without otherwise obtaining a warrant as required by *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981)?

2. Whether federal law enforcement officers may employ a ruse in entering a motel room to make an arrest and thereby avoid the necessity of obtaining a warrant as otherwise required by *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981)?

3. Whether Rule 41(c)(2) of the Federal Rules of Criminal Procedure is mandatory and requires federal law enforcement officers to obtain a telephonic search warrant when they do not have time to obtain a warrant by appearing personally before a magistrate?

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The primary effect of the government's brief in opposition is to emphasize the importance of granting certiorari.

The government first contends that police officers should be authorized to employ a ruse to arrest a person in his home or place of abode. This position is directly contrary to the decision of the Ninth Circuit in *United States v. Johnson*, 626 F.2d 753 (1980). Recognizing this fact, the

government suggests that *Johnson* is incorrect and should be overruled. Furthermore, the government speculates that the *Johnson* decision will probably be rejected even by the Ninth Circuit. *United States v. Martin*, an unpublished decision of the Ninth Circuit which was filed on July 1, 1982, is cited in support of this speculation.[1] Because *Martin* was not published, it may not be considered in determining the continued validity of the *Johnson* rule.

Assuming that the facts of the *Martin* case are as stated in the government's brief, however, those facts are distinguishable from the facts here. In *Martin*, the ruse caused the defendants to leave their home and their arrest was then effected in a public place. Here, however, the door to the petitioner's room was opened because of the ruse and the federal agents then entered to arrest him.

In any event, the *Martin* decision underscores the need for this Court to decide whether law enforcement officers may employ a ruse to avoid the effect of the Court's decisions in *Payton v. New York*, 445 U.S. 573 (1980), and *Steagald v. United States*, 451 U.S. 204 (1981).

A ruse was also used in the case of *United States v. Everroad*, 704 F.2d 403 (8th Cir. 1983). As stated by the court,

> "After Bragg's arrest, several other agents moved to apprehend Everroad at the Regency Motel. The agents learned from the motel clerk that the blue Datsun belonged to a man named Everroad who had checked into the motel that morning. The agents persuaded the motel clerk to make a hoax call to Everroad, informing him that his car had been involved in an accident and requesting him to come to the lobby. When Everroad stepped out of his room, the agents—without a warrant—arrested him at gunpoint."

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[1] *See, Table*, at 685 F.2d 448.

Everroad's conviction was reversed on other grounds and the Eighth Circuit did not consider the effect of the ruse. Nevertheless, it presents a third example of a case involving a ruse and emphasizes the need for an authoritative interpretation of the meaning of the *Payton* and *Steagald* cases with reference to such police tactics.

The government suggests that the basic issues in the petitioner's case need not be addressed because this is a case in which exigent circumstances excused the necessity of obtaining a warrant. This suggestion should be rejected for two reasons. First, neither the District Court nor the Court of Appeals found that any such exigent circumstances existed. Second, any such finding would be improper under the facts of the case,[2] because there was no explanation of why the agents employed the ruse instead of obtaining a warrant when they went to the room. Since the ruse improperly caused the door to be opened, the resulting struggle and arrests were therefore clearly illegal. Furthermore, federal agents are not permitted to create the "exigent circumstances" which are then supposedly relied upon to excuse the necessity for obtaining a warrant.

The government also contends that an Illinois arrest warrant is sufficient to authorize law enforcement officers to make an arrest in an Indiana motel room.[3] This contention is contrary to the fundamental rule that an arrest warrant has no extra-territorial validity.

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[2] The Court of Appeals did include a footnote to its opinion which discussed the entry into the petitioner's room, but this was not a finding of exigent circumstances as suggested in the government's brief. (Respondent's brief, p. 4.) In fact, the court could not have made such a finding because the alleged struggle at the doorway did not occur until *after* the federal agents had employed their ruse to get the petitioner's door open.

[3] As noted in the government's brief, the petitioner does not contest the existence of probable cause to arrest his co-defendant Douglas Nisbet. (Respondent's brief, p. 6 n. 4.) Petitioner does, however, reject the

(Footnote continued on page 4)

Furthermore, it emphasizes the uncertainty that has existed on this point throughout this case. At the trial, the government maintained that the federal agents properly relied upon the arrest warrant to enter the petitioner's motel room. Thereafter, the government conceded that the warrant was not sufficient to authorize the *entry* and argued on appeal that the federal agents acted as private citizens when they executed the warrants and arrested the petitioner and his co-defendant. Now the government is reverting to its original argument, and certiorari should be granted to consider whether the fundamental rule that arrest warrants have no extra-territorial validity should be changed.

The government also suggests that the petitioner has no standing to object to the ruse because the co-defendant is the one who opened the door. (Respondent's brief, p. 8.) This argument was not raised at the trial or in argument to the Court of Appeals and cannot be raised for the first time on certiorari. Furthermore, it ignores the facts that the motel room was registered in the petitioner's name and that the ruse was directed against both of the occupants of the room. The ruse was improper, and because the petitioner's arrest was a direct result of the ruse, it was equally improper.

Finally, the government contends that the petitioner is incorrect in asserting that the telephonic warrant procedures[4] are mandatory. This position conflicts with the decisions of four circuit courts of appeal. *See, United States*

(Footnote 3 continued

government's suggestion that there was probable cause for Nisbet's arrest "even apart from the outstanding Illinois arrest warrants". In fact, the government expressly conceded at trial that the only probable cause for Nisbet's arrest was the Illinois warrant. It further conceded that the agents relied exclusively upon this warrant to justify their entry into the petitioner's motel room. (Petition for Certiorari, p. 6).

[4] Rule 41 (c)(2) of the Federal Rules of Criminal Procedure.

v. McEachin, 670 F.2d 1139, 1146-48 (D.C. Cir. 1981); *United States v. Jones*, 696 F.2d 479, 487 (7th Cir. 1982); *United States v. Cuaron*, 700 F.2d 582 (10th Cir., February 14, 1983); and *United States v. Hackett*, 638 F.2d 1179, 1184-85 (9th Cir. 1980). *And see, United States v. Baker*, 520 F.Supp. 1080, 1084 (S.D. Iowa 1981).

In *McEachin*, the court of Appeals for the District of Columbia Circuit stated that it was "troubled" by the "apparent ignorance" of the officers about the telephonic procedures and the failure of the government to introduce any evidence about the availability of the telephonic warrant. 670 F.2d at 1146. In *Cuaron*, the Tenth Circuit expressed concern because telephonic warrants were not "looked upon favorably" in the district. As stated by the court,

> "When Agent Moren was asked why the agents did not attempt to get a telephone warrant, he explained: 'We have discussed this before with the magistrates here. It's not really looked upon favorably...[T]o my knowledge, there has never been one in the judicial district...' Rec., vol. III, at 182. Congress has clearly authorized magistrates to issue telephone warrants and it intended that they do so. Failure to seek a telephone warrant merely because '[i]t's not really looked upon favorably' will not be excused. Were the situation here less exigent, we would not hestitate to hold the warrantless search of Cuaron's house invalid." 700 F.2d at 590.

In the petitioner's case, the Seventh Circuit expressed a similar concern when the government attorney stated in oral argument that the procedures were not followed in the Southern District of Indiana because of a policy of the United States Attorney's office. As stated by the Court:

> "...we are disturbed by the government's policy of not obtaining a telephone search warrant...." 696 F.2d at 487.

The government's brief also asserts the view of the Department of Justice that the procedures are not mandatory. As stated in the brief, "Petitioner's contention (Pet. 14) that 'the telephonic warrant procedures are mandatory' is simply incorrect." (Respondent's brief, p. 10.)

Certiorari should therefore be granted to enable the Court to issue an authoritative interpretation of Rule 41(c)(2), which is being misconstrued by law enforcement officers, magistrates, United States attorneys, and the Department of Justice.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully submits that his petition for certiorari should be granted.

Respectfully submitted,

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